No. 553. 309.

Brf. of Willson for Petitioner

29438
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APR 27 1901
JAMES H. McKENNEY,

Filed April 27, 1901.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

THE LOUISVILLE TRUST COMPANY, TRUSTEE IN BANKRUPTCY OF SIMONSON, WHITESON & CO., D. G. SIMONSON, I. WHITESON AND LEO STERN, BANKRUPTS, ... Petitioner,

VS.

LEONARD COMINGOR, ... Respondent.

Motion, Petition for Writ of Certiorari, and Brief for the Petitioner, The Louisville Trust Company, Trustee in Bankruptcy of Simonson, Whiteson & Co., D. G. Simonson, I. Whiteson and Leo Stern, Bankrupts, in Bankruptcy.

AUGUSTUS E. WILLSON,
Counsel for The Louisville Trust Company, Trustee.

P. G. HUNSINGER PRESS, LOUISVILLE, KY.

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

THE LOUISVILLE TRUST COMPANY, TRUSTEE IN BANKRUPTCY OF SIMONSON, WHITESON & CO., D. G. SIMONSON, I. WHITESON AND LEO STERN, BANKRUPTS, ... *Petitioner*,

vs.

LEONARD COMINGOR, ... *Respondent.*

To Leonard Comingor:

You are hereby notified that on Monday, April 29th, A. D. 1901, at the motion hour, we will file a petition and enter a motion before the Supreme Court of the United States at Washington, D. C., to grant a writ of *certiorari*, directed to the Honorable, the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, to require said Court to certify to the Supreme Court of the United States for its review and determination a certain cause in said Circuit Court of Appeals lately pending, wherein Leonard Comingor was petitioner for review in the matter of Sinsheimer, Levinson & Co. &c. against Simonson, Whiteson & Co., D. G. Simonson, I. Whiteson and Leo Stern, bankrupts, in bankruptcy.

AUGUSTUS E. WILLSON,
Counsel for The Louisville Trust Company, Trustee in Bankruptcy of Simonson, Whiteson & Co., D. G. Simonson, I. Whiteson and Leo Stern, Bankrupts.

I accept service April 23, 1901.

W. M. SMITH,
Attorney for L. Comingor.

Executed the above notice by delivering on the 23d day of April, A. D. 1901, a true copy thereof to Leonard Comingor. I am an adult person and not interested in anywise in this matter.

MORRIS B. GIFFORD.

Subscribed and sworn to by Morris B. Gifford before me this 23d day of April, A. D. 1901. My commission expires January 6, 1904.

[SEAL]

RANDOLPH H. BLAIN,
Notary Public, Jefferson County, Kentucky.

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

THE LOUISVILLE TRUST COMPANY, TRUSTEE IN BANKRUPTCY, ... *Petitioner*,

VS.

L. COMINGOR, ... *Respondent.*

Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Sixth Curcuit, requiring it to certify to the Supreme Court of the United States, for its revision and determination, the petition for review in bankruptcy taken by the said L. Comingor against the Louisville Trust Company, trustee in bankruptcy of Simonson, Whiteson & Company, in the matter of Sinsheimer, Levinson & Company and others against Simonson, Whiteson & Company, in bankruptcy, lately depending in said Court of Appeals.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of the Louisville Trust Company, trustee in bankruptcy of Simonson, Whiteson & Company.

I.

This cause involves an entirely new question—a question of vast importance arising under the Bankruptcy Act of 1898.

The firm of Simonson, Whiteson & Co., and the individual members composing that firm, made a general assignment, for the benefit of all their creditors, to L. Comingor, on the 5th day of December, 1898, and Comingor duly accepted the trust.

Within the four months, prescribed by the Bankruptcy Act, a petition was filed by Sinsheimer, Levinson & Co. and others in the proper District Court of the United States, praying that the said assignors under the general assignment be adjudged bankrupts. Said Comingor was made a party to the proceeding and was duly summoned. (Act, Sec. 2 (6).) The prayer of the petition was granted, and upon appeal to the Circuit Court of Appeals a reversal was obtained. Upon further proceedings in the District Court a second adjudication was had and a second appeal prayed. Upon this appeal the decree was affirmed. The cause was then referred to the referee in bankruptcy. During the pendency of the cause before the referee a temporary receiver was appointed to gather in the assets of the bankrupts.

In June, 1900, a rule was issued by the referee, requiring L. Comingor, the assignee under the State assignment, to show cause why he should not pay to the trustee the sum of $3,398.90, being the amount retained by him from the estate of the bankrupts and which he claimed ought to be allowed to him for his commission; and this is directly authorized by the Act, Sec. 2 (7), which provides that controversies in relation to the estate may be determined. On the 28th day of June, 1900, another rule was issued against the said Comingor to show cause why he should not pay the further sum of $3,000, claimed by him to have been paid to M. A., D. A. and J. G. Sachs as counsel, for their services rendered to him as assignee under the said general assignment.

Said Comingor filed responses to said rules, claiming that as to the $3,398.90 held by himself he believes the Court will, on full hearing, allow him said amount for his commissions as assignee, and as to the $3,000 paid to his counsel he shows that he paid said sum for their services. He further shows that he has no funds with which to pay said trustee in bankruptcy either of the sums covered by the rules. He further set up by way of response that a suit for the settlement of his accounts as assignee was pending in the State Court and that he was still subject to the jurisdiction of said Court.

The referee adjudged said responses insufficient; whereupon said L. Comingor, on the 30th day of June, filed a petition praying that the orders of the referee might be reviewed by the Judge. The cause was then heard by the Judge, and on the 16th day of July was by him referred back to the referee to ascertain certain facts, to-wit, what services were rendered by the said Comingor and his counsel, and the value thereof and the necessity therefor. Proof was offered upon this re-reference by said Comingor and was taken before the referee, and a new report under said order of re-reference duly made to the Court. During the taking of such proof under the re-reference, to-wit, on the 10th of November, 1900, said Comingor tendered an amended response in which for the first time he sought to question the jurisdiction of the Court to try the matter in controversy except in a plenary suit. The referee declined to receive the amended response because under the order of re-reference he deemed he had no authority so to do. The cause was then re-heard by the Judge, and on the 19th of January, 1901, he filed an opinion therein, and on the 26th of January, 1901,

an order was entered that the petition for review filed by said Comingor be refused and dismissed, and said Comingor was directed to pay to The Louisville Trust Company, trustee in bankruptcy, the sums of $3,398.90 and $3,000. Said Comingor then filed in the Circuit Court of Appeals his petition for review of matters of law, and on April 2, 1901, the Circuit Court of Appeals entered an order setting aside the orders of the referee, adjudging the responses of the petitioner insufficient, and the order of the Court affirming the same.

The full effect of the decision of the Circuit Court of Appeals is this:

1. That the referee and the District Court could not proceed by summary proceedings to compel the assignee to turn over to the trustee in bankruptcy funds in his possession to which he claimed and asserted no title, but must proceed by plenary suit.

2. That the filing of the response by the assignee, Comingor, to the rule, the making of a stipulation and taking of proof thereunder, and the trial upon the merits of the response, do not amount to a consent to the jurisdiction.

3. That the Circuit Court of Appeals, though reviewing matters of law only, may assume as true, averments made in response to a rule.

4. That a response showing that a fund in question was paid to respondent's counsel is sufficient without its appearing that respondent is unable to recover back the fund from the counsel.

5. That the trustee must submit to the State Court to decide what part, if any, of the assets might be used by the assignee for himself and his attorneys, and consequently must

leave to the State Court the partial administration of the bankrupt's estate. This is in conflict with the decision of the same Circuit Court of Appeals in Leidigh Carriage Co. vs. Stengel, 95 Fed. 637.

In *in re* Arthur E. Mueller, trustee in bankruptcy of Edward B. Nugent, against W. T. Nugent, the Circuit Court of Appeals in its opinion stated in substance that in order to compel the assignee under a general assignment to deliver to the trustee in bankruptcy the funds in his hands a plenary suit must be brought. This Court has granted a *certiorari* in that case and has also advanced the case, and it is now on the docket of this Court for the 28th of October. That part of the opinion of the Court below is not necessarily involved in the controversy and therefore this Court may not find it necessary to consider the point; however, in the case at bar it is the main question involved, and owing to its importance your petitioner respectfully submits that it ought to be passed on by this Court in order that there may be a uniform administration of the bankruptcy law throughout all the circuits. Yet there is no such uniformity. For instance, in the State of Indiana (Seventh Circuit), *in re* Smith, 92 Federal, page 135, the Judge sustained the right to compel the assignee to deliver to the trustee in bankruptcy property held by him as assignee; while in Pennsylvania Judge McPherson, *in re* Stokes, 106 Federal, 312, has ruled the same way. The Circuit Court of Appeals in the Ninth Circuit, *in re* Francis-Valentine Co., 94 Fed., 793, has sustained the right to compel a sheriff by rule to deliver to the trustee property of the bankrupt seized within four months prior to the proceedings in bankruptcy, and distinguishes that case from the case of Marshall vs. Knox, 16 Wall., 551, upon the theory that the party ruled is a mere custodian and holds no title.

The District Courts in Vermont, New York and West Virginia have also decided that the proceeding may be by rule under such circumstances. (*In re* Brooks, 91 Fed. 518; *in re* Raymond W. Kenney, 95 Fed. 427; *in re* Moore, 104 Fed. 869.) Besides, your petitioner thinks the case of White vs. Schloerb, 178 U. S. 542, is in conflict with the decision of the Circuit Court of Appeals which is now complained of.

It is a notable fact that while there are so many cases sustaining the right of the court to compel the assignee, or other mere custodian, by rule to deliver to the trustee in bankruptcy the assets belonging to the estate, there are no cases sustaining the other view except those of the Circuit Court of Appeals in this, the Sixth Circuit.

The petition for review in the Circuit Court of Appeals was not confined to seeking a review of matters of law only arising in the record of the bankruptcy proceeding, but contained allegations as to many extraneous matters alleged to have occurred in the State Court, making the hearing in the Circuit Court of Appeals an appeal in equity instead of a review of matters of law. Nevertheless the Circuit Court of Appeals refused to strike out these extraneous matters and refused to permit the trustee to traverse them. In these rulings it is respectfully submitted that the Circuit Court of Appeals erred in the very construction of the Bankruptcy Act which it had previously laid down in the case of Cunningham vs. German Insurance Bank, 95 Fed. 932.

Even if under the case of Bardes vs. Bank, 178 U. S. 524, there was no original jurisdiction to issue the rule, the respondent, Comingor, waived that objection and consented to the jurisdiction by appearing and defending upon the merits and invoking the jurisdiction of the Court, which,

according to the reasoning of Judge Lowell, *in re* Steuer, 104 Fed. 976, is a consent to the jurisdiction. This view the District Judge upheld. Your petitioner submits that it is sound.

As the question involved in the case at bar will come before this Court on the 28th of October in the Nugent case, it is respectfully suggested that this cause should be ordered certified up and also set for hearing at the same time.

Wherefore, your petitioner prays that a writ of *certiorari* may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record in all proceedings in said Circuit Court of Appeals in the cause therein entitled, "Sinsheimer, Levinson & Co. and others against Simonson, Whiteson & Co., in bankruptcy, No. 943," to the end that said cause may be reviewed and determined by this Court as provided by law; and that the judgment of the said Circuit Court of Appeals in said case may be so modified as to deny the petition for review filed by the said Leonard Comingor to said Circuit Court of Appeals.

And your petitioner will ever pray.

AUGUSTUS E. WILLSON,
Counsel for Petitioner.

STATE OF KENTUCKY, }
JEFFERSON COUNTY. } *Sct.*

H. V. Loving, being duly sworn, says that he is the President and chief officer of The Louisville Trust Company, trustee in bankruptcy of Simonson, Whiteson & Co., D. G. Simonson, I. Whiteson and Leo Stern, bankrupts, the petitioner named; that he has read the foregoing petition, and the facts therein stated are true, as he believes.

H. V. LOVING.

Subscribed and sworn to before me this 23rd day of April, A. D. 1901. My commission expires on the 27 day of January, 1902.

[SEAL]

NORA KIRCH,
Notary Public within and for the County of Jefferson, State of Kentucky.

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

THE LOUISVILLE TRUST COMPANY, TRUSTEE IN BANKRUPTCY OF SIMONSON, WHITESON & CO., D. G. SIMONSON, I. WHITESON AND LEO STERN, BANKRUPTS, ... *Petitioner,*

vs.

LEONARD COMINGOR, ... *Respondent.*

BRIEF FOR PETITIONER ON APPLICATION FOR WRIT OF CERTIORARI.

As the petition for a writ of *certiorari* is itself so complete but little need be said in a brief in support thereof.

I.

The petition sets forth as a ground why the writ of *certiorari* should be granted that the ruling of the Circuit Court of Appeals prohibiting a court in bankruptcy to gather in the assets of the bankrupt by summary process in cases where a party holding possession of the assets is a mere custodian, is in conflict with the decisions of other Federal Courts and thereby the uniform administration of the law is prevented.

The petition for the writ cites the cases showing this want of uniformity.

II.

The petition also shows that in Bardes vs. Bank, 178 U. S. 524, a party might consent to the jurisdiction of the Federal Court; and *in re* Steuer, 104 Fed. 976, Judge Lowell construes a defense to the merits as such a consent.

III.

The Circuit Court of Appeals in effect holds that where a rule is issued against a party the averments in his response must be conclusively assumed to be true. In the case at bar the testimony taken before the referee, though made part of his report to the Judge, was not included in the record carried to the Circuit Court of Appeals.

IV.

The response made to the rule issued by the referee shows that part of the bankruptcy fund was paid to the counsel of the assignee under the State law for their services. It does not show that any court authorized the payment of such funds, and it is not the practice in equity, either in the Staet or Federal Courts, for fiduciaries to determine for themselves what, if any, compensation shall be paid their counsel, but to submit such questions to the court before whom their accounts are settled, and then if the courts make the allowances they are paid.

V.

The Circuit Court of Appeals for the Sixth Circuit, in Leidigh Carriage Co. vs. Stengel, 95 Fed. 637, has expressly

decided that the jurisdiction of the Federal Court to wind up the affairs of a bankrupt is paramount, and further that the assignee may be made a party to the bankruptcy proceedings and may be required to hold the assets of the bankrupt subject to the order of the District Court in bankruptcy; nevertheless the decision of the same Circuit Court of Appeals now complained of is in direct conflict with that ruling, for it is now declared that the making of Comingor a party to the proceedings was improper, and that he can not be compelled in the bankruptcy proceedings to deliver the assets to the trustee in bankruptcy, but that the trustee must resort to a plenary suit for this purpose, which means in this instance that he must bring an action in the State Court and thereby leave to the State Court at least a partial administration of the assets of the bankrupt. This deprives the Federal Court of its paramount jurisdiction. In Leidigh Carriage Co. vs. Stengel, 95 Fed. 637, the same Court of Appeals, through Judge Taft, said:

"It is next objected in argument and the briefs, though "we do not find an assignment of error specifically directed "to the point, that the assets of this defendant bankrupt "are in the hands of the assignee for the benefit of cred- "itors, subject to the orders of the probate court; that the "District Court in bankruptcy can not obtain jurisdiction "to administer the assets, which are in the course of "administration, and in the possession of officers of other "courts. If this objection were to be sustained it would "seriously embarrass the enforcement of the bankruptcy "law, and make it subordinate to the State insolvency "assignment laws, wherever an insolvent debtor who had "committed an act or bankruptcy had placed his assets in "the hands of the assignee acting by State law under the "direction of the probate court. It is generally true that "as between courts of concurrent jurisdiction, the court

"which first obtains possession of the *res* must retain "possession of it until the *res* has been finally dis- "posed of, and anyone else interested in the *res* must "apply to that court if he desire relief with respect to the "property in the possession of that court. But as between "District Courts sitting in bankruptcy and State courts "for the administration of insolvent estates, there is no "concurrent jurisdiction. The Constitution of the United "States, by giving to Congress the power to pass uniform "bankruptcy laws, gives to the courts in which Congress "shall vest this power paramount jurisdiction in bank- "ruptcy proceedings. The orders in bankruptcy are "therefore superior to those of a State insolvency court. "Section 720, which forbids a court of the United States "from enjoining proceedings in a State court, expressly "excepts bankruptcy proceedings. This is the plain "intimation, by Federal and paramount law, that where a "Federal bankruptcy court shall take jurisdiction, there the "State insolvency court must yield. Hence it is that "the assignee for the benefit of creditors of the defendant "company, the grantee in the deed, which is by the Federal "law an act of bankruptcy, may be made a party in the "bankruptcy court, and may be required to hold the "assets of the bankrupt subject to the order of the district "court in bankruptcy."

In some circuits it has been declared that such assignments are absolutely void, while in others it is declared that the assignment is merely voidable, but is made void by a decree of adjudication in bankruptcy. In the case at bar, in the first opinion rendered by the Circuit Court of Appeals, 95 Fed. 948, the Court declared that the adjudication avoided all sales made by the assignee, in other words, that the adjudication rendered all acts of the assignee void. If his sales are void, his employment of counsel and his paying his counsel would also be void. That is the law of this circuit, and Comingor was a party to the proceedings at the time it was so established; yet if the present opinion of the Circuit Court of

Appeals is allowed to stand, the trustee in bankruptcy will be compelled to resort to the State Court with its innumerable delays, and there submit to a retrial of the question of whether or not Comingor was entitled to any compensation at all, and whether or not he should have paid his counsel out of the funds of the estate without authority from the State court so to do. This surely is taking from the bankruptcy court the jurisdiction to administer upon the bankrupt's estate, and this too in the face of the ruling of our Circuit Court of Appeals in the Leidigh Carriage Co. case, *supra.* In this same case, quoted in 95 Fed. 954, Judge Taft declared that the bankruptcy proceedings would possibly defeat the payment of the costs already earned in the State Court proceedings. The goods had been converted into money, and, with the exception of the two sums now in controversy, paid into the State Court. The trustee in bankruptcy applied to the State Court for this fund in its depository and yet that Court required the payment of the costs of its officers and only directed its receiver to deliver to the trustee in bankruptcy the balance after such costs were paid. If the trustee is now compelled to bring an action in the State Court to recover from Comingor or his counsel the funds now in question, that Court would undoubtedly consider the rights of Comingor and his counsel to their compensation. The mere fact of the trustees invoking the aid of the State Court, would perhaps give it such right, and the result would be that the State court and not the bankruptcy court would to that extent be administering upon the assets of the bankrupt.

In re John A. Etheridge Furniture Co., 92 Fed. 331, Judge Barr appointed a receiver to take from the assignee under the general assignment the funds of the bankrupt.

See Bryan v Bernheimer No 58 Act J. 1903

In the case of Lea Brothers vs. West, 91 Fed. 237, the same question was decided by the District Court for the Eastern District of Virginia. That case was taken to this Court on the certificate of a particular question.

Section 2 of the Act, (6) and (7), is as follows: "bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy;" and "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided."

It would seem plain, then, that if the Federal Court may bring in and substitute additional parties when necessary for the complete determination of a matter in controversy and cause estates of bankrupts to be collected and determine controversies in relation thereto, the questions whether officers of the State court should be allowed their costs; whether assignees might retain compensation for their services as assignees; and whether they may pay their counsel out of the estate without any allowance of court therefor, must be relegated to the State court in a plenary suit, then the jurisdiction of the Federal Court is not supreme and the bankruptcy court may not bring in new parties for the complete determination of matters in controversy, and may not cause the estates to be collected and determine controversies in relation thereto.

The consequences of the ruling of the Circuit Court of Appeals now complained of would lead to results in some instances destroying the bankruptcy law, certainly in cases where the making of a general assignment is the cause of bankruptcy. For example: Suppose an assignee should

decline to turn over any of the funds coming to his hands. The Circuit Court of Appeals has held that under such circumstances the only remedy is for the trustee to bring a plenary suit in the State Court. Suppose the State Judge, as many of them will do, should decide that, having the first jurisdiction, he will hold the assets in his Court. Then under these conditions the trustee undoubtedly would be bound by that decision and the whole estate would be then administered in the State Court to the exclusion of the bankruptcy court. I can see no escape from the logic of this reasoning and no escape from the result described except by a complete reversal or a serious modification of the ruling of the Circuit Court of Appeals.

Therefore it is respectfully prayed that the petition for a *certiorari* be granted.

AUGUSTUS E. WILLSON,

Counsel for The Louisville Trust Co., Trustee in Bankruptcy of Simonson, Whiteson & Co. and others, Bankrupts.

2945

cf. 176 U.S. 309.
(By. of Willson & Co. (Ky.) Case

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JAMES H. McKENNEY,
Clerk.

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OCTOBER TERM, A. D. 1900.

The Louisville Trust Company, Trustee in Bankruptcy of Simonson, Whiteson & Co., D. G. Simonson, I. Whiteson and Leo Stern, Bankrupts, ... Petitioner,

vs.

Leonard Comingor, ... Respondent.

MOTION TO ADVANCE THE CASE FOR HEARING.

GROUNDS FOR MOTION TO ADVANCE.

AUGUSTUS E. WILLSON,
Counsel for The Louisville Trust Company, Trustee.

P. C. HUNSACKER PRESS, LOUISVILLE, KY.

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

THE LOUISVILLE TRUST COMPANY, TRUSTEE IN BANKRUPTCY OF SIMONSON, WHITESON & CO., D. G. SIMONSON, I. WHITESON AND LEO STERN, BANKRUPTS, ... *Petitioner*,

VS.

LEONARD COMINGOR, ... *Respondent.*

To Leonard Comingor:

You are hereby notified that on Monday, April 29th, A. D. 1901, at the motion hour, we will enter a motion before the Supreme Court of the United States at Washington, D. C., to advance and hear the above styled cause on the earliest practicable day, and will then file grounds in support of said motion.

AUGUSTUS E. WILLSON,
Counsel of The Louisville Trust Company, Trustee in Bankruptcy of Simonson, Whiteson & Co., D. G. Simonson, I. Whiteson and Leo Stern, Bankrupts.

I accept service April 23, 1901.

W. M. SMITH for L. COMINGOR.

Executed the above notice by delivering on the 23rd day of April, A. D. 1901, a true copy thereof to Leonard Comingor. I am an adult person and not interested in anywise in this matter.

MORRIS B. GIFFORD.

Subscribed and sworn to by Morris. B. Gifford before me this 23rd day of April, A. D. 1901. My commission expires Jan. 6, 1904.

[SEAL]

RANDOLPH H. BLAIN,
Notary Public, Jefferson County, Kentucky.

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

THE LOUISVILLE TRUST COMPANY, TRUSTEE IN BANKRUPTCY OF SIMONSON, WHITESON & CO., D. G. SIMONSON, I. WHITESON AND LEO STERN, BANKRUPTS, ... *Petitioner*,

VS.

LEONARD COMINGOR, ... *Respondent.*

MOTION TO ADVANCE THE CASE FOR HEARING.

Now comes The Louisville Trust Company, Trustee in Bankruptcy of Simonson, Whiteson & Co., D. G. Simonson, I. Whiteson and Leo Stern, bankrupts, by Augustus E. Willson, its counsel, and moves this Honorable Court to advance and hear this cause at the earliest practicable day, and submits herewith its grounds for said motion.

GROUNDS FOR MOTION TO ADVANCE.

1. A petition for *certiorari* has been filed in this cause. Two important questions are involved, namely, the right of the District Court by rule to require the assignee holding property of the bankrupts under a general assignment under the State law, which was the ground of bankruptcy and for which an adjudication was had, to turn over to the trustee

in bankruptcy said property; or whether the trustee in bankruptcy shall be compelled to resort to an independent action which, in this as in most cases, will have to be brought in the State courts where the delays are numerous and vexatious.

2. Whether, after a rule has been actually issued against the assignee to deliver the property to the trustee in bankruptcy, he responds and defends upon the merits without objecting to the jurisdiction, he can, after the case is decided against him, be heard to complain that the Court was without jurisdiction to proceed against him.

The importance of the case for the proper administration of the bankruptcy law can not be overestimated. The rulings upon the question involved are different in so many other circuits from the ruling in the case at bar as to destroy the uniformity in the administration of the law.

In re Brooks, 91 Fed., 518,

In re Raymond W. Kenney, 95 Fed., 427,

In re Moore, 104 Fed., 869,

In re Francis-Valentine Co., 94 Fed., 793,

In re Smith, 92 Fed., 135,

In re Stokes, 106 Fed., 312,

In re White vs. Schloerb, 178 U. S., 542,

In re Steuer, 104 Fed., 976,

All of these cases, it is submitted, are in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit now complained of.

3. The same question is involved in the case of Mueller, Trustee, against Nugent, which is set for hearing in this Court on the 28th of October, and many cases throughout the country are awaiting action upon the question.

In the Nugent case the statement in the opinion, that a plenary suit must be brought in order to recover from the

assignee under the State law the assets of the bankrupt, was *obiter dictum*, while in the case at bar the question is directly involved, and it is respectfully suggested that this case should be advanced and heard with the Nugent case in order that all the points involved may be fully decided in cases involving all of such points.

Again, it is respectfully suggested that this decision of the Circuit Court of Appeals arises from a misconstruction of the utterances of this Court in Bardes vs. Bank, 178 U. S. The importance of having all misconceptions of this Bardes case removed, and of having the jurisdictional question under the bankruptcy act authoritatively determined, so that the law may be uniformly administered, is strongly commented upon by Judge Lowell *in re* Ward, 104 Fed., 985.

For these reasons it is respectfully urged that this case be heard at the earliest practicable date.

Respectfully submitted,

AUGUSTUS E. WILLSON,
Counsel for The Louisville Trust Company, Trustee in Bankruptcy of Simonson, Whiteson & Co., etc.